



## The CommLaw Group

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October 2, 2008

### Via ECFS

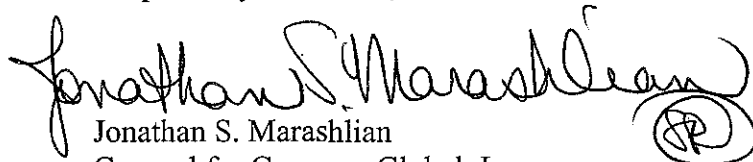
Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Notice of Ex Parte Communication**  
**WC Docket No. 06-122**  
**File Nos. EB-06-IH-0902, EB-06-IH-3060; EB-08-IH-1666**

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, this letter and its attachments are submitted via ECFS for inclusion in the public record of the above-captioned proceedings, with copies of this letter sent via email to those indicated below.

Respectfully submitted,

  
Jonathan S. Marashlian  
Counsel for Compass Global, Inc.

Enclosures

cc via email:

Nicholas Alexander – Office of Commissioner Robert McDowell  
Scott Bergmann – Office of Commissioner Jonathan Adelstein



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October 2, 2008

**Via Email**

[Nicholas.Alexander@fcc.gov](mailto:Nicholas.Alexander@fcc.gov)

Mr. Nicholas Alexander  
Office of Commissioner Robert McDowell  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

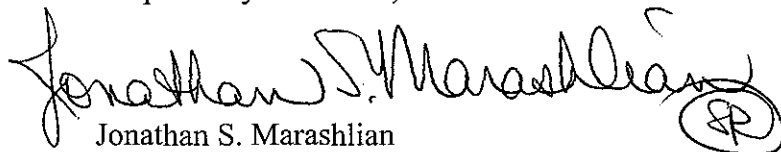
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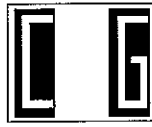
Dear Mr. Alexander:

On October 1, 2008, the undersigned, as well as Charles H. Helein of Helein & Marashlian, LLC, and Dean Cary, President of Compass Global, Inc., met with and discussed issues concerning and the position of Compass Global, Inc. in connection with you the above-captioned proceedings. Copies of the handouts distributed at this meeting are enclosed herewith.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

  
Jonathan S. Marashlian  
Counsel for Compass Global, Inc.



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October 2, 2008

**Via Email**

[Scott.Bergmann@fcc.gov](mailto:Scott.Bergmann@fcc.gov)

Mr. Scott Bergmann  
Office of Commissioner Jonathan Adelstein  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Notice of Ex Parte Communication  
WC Docket No. 06-122  
File Nos. EB-06-IH-0902, EB-06-IH-3060; EB-08-IH-1666**

Dear Mr. Bergmann:

On October 1, 2008, the undersigned, as well as Charles H. Helein of Helein & Marashlian, LLC, and Dean Cary, President of Compass Global, Inc., met with you and discussed issues concerning and the position of Compass Global, Inc. in connection with the above-captioned proceedings. Copies of the handouts distributed at this meeting are enclosed herewith.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

Jonathan S. Marashlian  
Counsel for Compass Global, Inc.

**SUMMARY OF COMPASS GLOBAL'S POSITIONS – APPEAL OF USAC DECISION**  
**Petition for Review of USAC Decision – WC Docket No. 06-122**

**USAC and NECA's Mismanagement have Unfairly Prejudiced Compass Global**

In its *Request for Review* in WC Docket No. 06-122, Compass Global explains that, despite the Company's continued efforts to fulfill questionable Universal Service Fund (USF) obligations, USAC and NECA mismanagement and failure to adhere to Commission regulations governing the appeals processes have unfairly prejudiced Compass and have directly contributed to the premature issuance of the Notice of Apparent Liability (NAL) in File No. EB-06-IH-3060. *See Compass Global, Inc. Request for Review of Decision of the Universal Service Administrator and Request for Initiation of an Investigation into the Policies and Procedures of the Universal Service Administrative Company in this Matter*, CC Docket No. 96-45 (Filed: July 31, 2008).

- USAC and NECA have misrepresented and withheld critical information necessary for Compass Global to determine its obligations and potential liabilities.
- USAC altered Form 499-As without Compass' authorization and despite certification of the original submissions under penalty of perjury by a corporate officer.
- USAC refused to accept Form 499-A revisions submitted within 12 months of a filing deadline that was unambiguously established by the Enforcement Bureau.
- USAC inexplicably modified the "received" dates of revised Form 499-As to ensure the filings exceeded a 12-month period.
- USAC and NECA prematurely referred alleged debts, subject to valid and pending appeals, to the U.S. Treasury.
- USAC and NECA have ignored Compass' pleas to honor its due process rights.

These complained of actions are contrary to USAC and NECA's duties to administer the USF and TRS programs fairly and in accordance with Commission regulations. USAC and NECA's failures to comply with these basic expectations have unquestionably prejudiced Compass Global, as the NAL, *In the Matter of Compass Global, Inc. Apparent Liability for Forfeiture*, File No. EB-06-IH-3060 (Released: April 9, 2008), can be directly traced to the actions and inactions of both USAC and NECA, as well as the inaccurate and incomplete factual records provided by each agency which formed the basis for the Bureau's allegations.

In its *Petition for Review*:

- \* Compass Global asks the Commission to direct USAC to accept the Company's revised 2006 Form 499-A, recalculate contribution assessments based upon the revisions therein, and refund or credit of amounts already paid by Compass Global in excess of amounts rightfully owed.
- \* Compass Global also requests the Commission hold in abeyance all purported collection actions and/or further attempts to transfer alleged debts to the U.S. Treasury pending full and final resolution of the matters addressed in File No. EB-06-IH-3060.
- \* The DCIA and FCC regulations make it is absolutely clear that disputed debts cannot be referred to the U.S. Treasury without first allowing all administrative appeals to run their course. Compass timely enforced its rights of appeal, yet debt referrals were made and continue to be made. The Commission must declare the existing debt referrals null and void and direct Fund Administrators to comply with the law.
- \* Compass Global also requests the Commission initiate an inquiry into the conduct of various Fund Administrators to determine the full extent of their deviation from their legitimate scope of delegated authority.



**SUMMARY OF COMPASS GLOBAL'S POSITIONS – CARRIER'S CARRIER RULE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

**NAL is Premature; Commission Should First Resolve Pending Carrier's Carrier Rule Disputes**

The Commission should cancel NAL pending final resolution of disputes regarding legitimacy and enforceability of the Carrier's Carrier Rule (CCR).

- In the NAL response, Compass asserts that USAC's establishment of the CCR is invalid because:
  - USAC lacks authority to adopt substantive rules, and
  - Adoption of a rule imposing vicarious liability on wholesale providers is a substantive rule that must be subject to notice and comment procedures of the Administrative Procedures Act (APA).
- Global Crossing and IDT filed Petitions seeking Commission rulings which call into question the legitimacy and enforceability of the CCR. *See IDT Corporation and IDT Telecom Request for Review of Decision of the Universal Service Administrator* (WC Docket 06-122) and *Global Crossing Bandwidth, Inc. Request For Review of Decision of Universal Service Administrator* (CC Docket No. 96-45, CC Docket No. 97-21). These Petitions raise issues identical to Compass arguments in its NAL Response.
- Both Petitions argue that USAC's Form 499 instructions are at odds with the actual, published FCC regulations and are therefore invalid, thereby rendering these "instructions" unenforceable (Compass makes substantively identical arguments at Pages 56 through 61 of its NAL Response):
  - IDT asserts that existing FCC rules explicitly state that only "**end user**" revenue is subject to the USF contribution base (see Page 56 of Compass NAL Response);
  - Global Crossing asserts that Commission regulations do not provide for enforcement action against underlying carriers for a reseller's failure to make USF contributions – a stark contrast to the imposition of "vicarious" liability, as set forth in USAC's Form 499 instructions (see Page 58 of Compass NAL Response).
- The Petitions and Compass' NAL Response maintain that the CCR is invalid and unenforceable due to non-adherence with the strictures of the Administrative Procedures Act.
- The Petitions and Compass' NAL Response highlight serious deficiencies with the policy underlying USAC's imposition of the CCR, and a Commission finding that the CCR is illegitimate will significantly impact the alleged violations in the NAL. For the sake of judicial economy, the Bureau must therefore await final resolution of this fundamental issue before it can conclude Compass violated Commission rules.
- Furthermore, the Commission should not, in its efforts to shore-up deficiencies in the USF contribution base, continue to contort precedent and vitiate the strictures of the APA by permitting USAC to extend contribution obligations to entities which exceed the scope intended by Congress and announced by the Commission in its published regulations. At a minimum, the Commission should adhere to the model of the recent *InterCall Order*, wherein the Commission supported a USAC conclusion that audio-bridging service providers should be subject to USF contribution obligations on a prospective basis only, due to the uncertainty and lack of any clear, unambiguous application of the Commission's rules. *See Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, FCC 08-160 (2008).

**SUMMARY OF COMPASS GLOBAL'S POSITIONS – ENHANCED WHOLESALE SERVICE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

**Enhanced Wholesale Service is Internet Peering, Not Telecommunications**

Compass's Enhanced Wholesale Service (EWS) service is a "Next Generation VoIP Peering Center" that allows a range of disparate and unique VoIP providers to meet at a central peering point to exchange VoIP and data traffic. EWS is an "information service" and not "telecommunications" or "telecommunication service" under Commission regulations and substantial precedent.

❖ As established in the *pulver.com FWD Order*, the Commission's policies and regulations treat VoIP services that are not connected to the PSTN as "information services," subject to minimal regulation. See *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Order, 19 FCC Rcd 3307 (2004).

❖ Compass's EWS does not satisfy the definition of "interconnected VoIP" because traffic is not interconnected with the PSTN and does not use traditional CPE. Further, Compass, operating as a VoIP peering provider, is generally unaware of the identity or location of the originating or terminating end-user or whether the terminating VoIP provider then terminates the call to a PSTN.

❖ The Bureau ignored three key facts that distinguish EWS from AT&T's Phone-to-Phone VoIP and Enhanced Calling Card services:

1. AT&T's services were controlled by AT&T on an end-to-end basis – EWS is wholesale only; and
2. AT&T had direct and actual knowledge calls touched the PSTN – Compass had no such awareness nor could it.

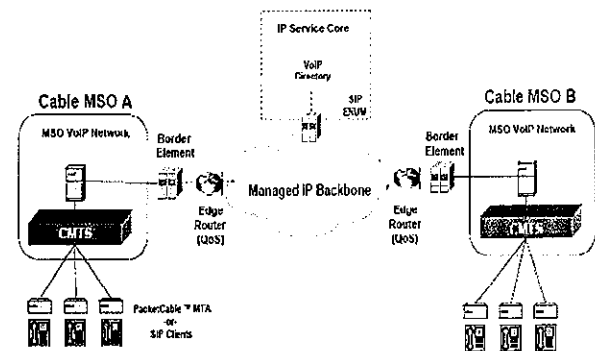


Figure 3 - VoIP Peering Architecture

Beyond unassailable facts which distinguish EWS from regulated telecommunications services and support the conclusion that EWS is an information service, there are broader policy considerations at play which should not be decided in the context of File No. EB-06-IH-3060. The Commission should abstain from supporting an Enforcement Bureau decision arrived at in a closed enforcement action when the decision is likely to have far-reaching, disruptive, and costly consequences on the nascent IP peering industry. The regulation of IP-enabled services, which includes Compass' IP peering service, is properly being decided in a rulemaking proceeding, *In the Matter of IP-Enabled Services*, Docket No. 04-36. The Commission should oppose a Bureau ruling which would prematurely declare IP peering to be anything other than an information service.



**SUMMARY OF COMPASS GLOBAL'S POSITIONS – OVERVIEW OF COMPASS NAL RESPONSE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

**NAL is fatally flawed as a result of numerous procedural and analytical failings**

The findings contained in the Notice of Apparent Liability (“NAL”) are based on an erroneous and overly expansive reading of Commission precedent and regulations. Moreover, in issuing the NAL, the Commission disregarded its own procedural requirements and forfeiture guidelines. Assessing penalties on Compass based on this logical “house of cards” will not only stifle competition, it will drive innovation offshore.

Now more than ever, technology plays a crucial role in the United States and global economies. It is incumbent on the Commission to exercise its statutory duty to foster competition and promote innovation in a fair and non-discriminatory manner.

**A. Due Process**

- The Commission’s adherence to the requirements of due process facilitates the promotion of universal service.
  - Central to the protection of due process rights is the Commission’s obligation to adhere to its own rules and regulations.
  - As of the issuance of the NAL, Compass’ NECA and USAC appeals were pending.
  - Compass has not exhausted its right of appeal of USAC’s decision, as guaranteed by the Commission’s rules and regulations.
  - Resolution of Compass’ USAC appeal will impact every element of the NAL.
  - The Commission’s actions violate the Debt Collection Improvement Act.
  - Thus, the NAL and the Debt Transfers are premature and unenforceable.

**B. Compass is a de minimus non-common carrier, wholly exempt from the very requirements the NAL asserts have been violated.**

- Compass is not a common carrier, nor does Compass provide telecommunications services.
  - Compass offers its Enhanced Platform Service (“EPS”) and its Enhanced Wholesale Service (“EWS”) on a private, non-common carrier basis.
    - Compass does not offer its services to the public.
      - Compass sells its EPS and EWS selectively to a limited group of carrier customers.
      - Compass does not make its rates or terms of service public.
      - Compass utilizes individually tailored service contracts.
      - Classification of Compass as private carrier is consistent with Commission and D.C. Circuit precedent.
    - Compass does not permit customers to transmit intelligence of their own design and choosing.
      - Compass’ assistance of carrier customers to provide common carriage does not render Compass a common carrier.
      - Compass retains the ability to control and manipulate intelligence.



**SUMMARY OF COMPASS GLOBAL'S POSITIONS – OVERVIEW OF COMPASS NAL RESPONSE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

- Erroneous applications of Commission precedent and regulations does not equate to sound oversight of the Universal Service Fund.
- Compass cannot be treated as a common carrier because it does not provide telecommunications services.
  - Compass does not provide its services directly to the public.
  - Compass offers its services only to unique and specified classes of eligible users.
- Subjecting Compass' wholesale revenue to Universal Service Fund ("USF") contributions requirements is contrary to prior Commission regulations and precedent and is tantamount to "adjudi-making" in violation of the APA.
  - Compass' wholesale revenue should not be subject to USF contribution requirements.
  - In order to avoid "double-counting," the Commission has repeatedly stated that only retail revenue derived from end users should be subject to contribution requirements.
  - Compass had a good faith belief that its customers were contributing to the USF.
  - The "vicarious liability" provision of the Form 499A instructions is invalid and unenforceable.
    - The promulgation of the "vicarious liability" provision in the Form 499A instructions violated the APA and the due process requirements of the U.S. Constitution.
    - The vicarious liability provision constitutes a decisional rule and has a materially adverse impact on contributors.
    - USAC has no authority to create decisional rules governing USF programs absent express authorization from the FCC.
  - With regard to EWS, Compass has fully complied with the post-2004 Form 499A.
  - Beginning with calendar year 2005, Compass reported all of its wholesale EPS revenue as retail "Toll Reseller" revenue.
  - Beginning with calendar year 2007, Compass reverted to its pre-FCC investigation legal position and reported its wholesale EPS revenue as wholesale "Toll Reseller" revenue.
- Pursuant to the de minimus exception, Compass is exempt from USF filing and contribution requirements.
  - Fund contributors that provide telecommunications on a non-common carrier basis and whose contributions would be de minimus are not required to file Forms 499 or contribute to any federal support mechanisms.
  - Revenue derived by Compass has and remains more appropriately booked as wholesale revenue, and wholesale revenue is exempt from all support mechanisms.
  - Thus, revenue derived from Compass' non-common carrier operations is de minimus, and Compass is not required to file Forms 499, contribute to federal support mechanisms or pay regulatory fees.





**SUMMARY OF COMPASS GLOBAL'S POSITIONS – OVERVIEW OF COMPASS NAL RESPONSE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

- The Commission's classification of EWS and EPS as telecommunications services is based on an erroneous understanding of Compass's services and is contrary to Commission precedent and policies.
- The Commission's rush to judgment will result in the stifling of competition and will drive innovation offshore.
  - The Commission's findings in the NAL are tantamount to "adjudi-making" in violation of the APA.
  - Compass' service offerings constitute session processing and fall short of the comprehensive bundling of all network elements necessary to the provision of an end-user telecommunications service.
    - Like switching, session processing alone does not constitute a telecommunications service.
    - Because Compass does not offer telecommunications services, it cannot be classified as a telecommunications carrier subject to federal contributions requirements.
  - To the extent Compass' offerings constitute a service, such offerings are properly classified as an information service.
    - Compass' offerings are analogous to VANs. – which are largely unregulated and not subject to USF obligations.
    - To the extent that Compass' network is used to provide processing of voice communications, such voice traffic is routed entirely in IP and is indistinguishable from packet-switched information sent over a data network.
    - Any basic transmission services using telecommunications are incidental to the primary features of Compass' enhanced network.
  - Compass' services meet the definition of Internet service, and as an Internet service provider ("ISP"), Compass is exempt from USF contribution requirements.
  - The protocol processing functionality of Compass' offerings qualifies such services as information services.
    - Compass' service changes the protocol of transmission between input and output.
  - The NAL impermissibly expands the Commission's holding in the IP-in-the Middle Order.
    - The Commission explicitly limited the IP-in-the-Middle Order to the types of services at issue in that proceeding.
    - Compass' services are not analogous to those at issue in that proceeding.
  - Consistent with the Commission's finding in the *Pulver* decision, Compass' services implicate computer-to-computer IP-enabled transport.
  - Compass' services are not capable of offering a connection to the PSTN and are not interconnected VoIP services.
  - The NAL ignores the regulatory uncertainty surrounding the classification of VoIP.



**SUMMARY OF COMPASS GLOBAL'S POSITIONS – OVERVIEW OF COMPASS NAL RESPONSE**  
**USF Program Compliance: Notice of Apparent Liability - File No. EB-06-IH-3060**

- The Commission's findings in the NAL are arbitrary and capricious and entitled to little to no deference.
  - The NAL impermissibly attempts to impose liability on Compass for violations of rules of which it had no fair notice.
- Compass has not violated Commission rules by failing to timely file Forms 499, by failing to make regulatory fee payments or by underpaying contributions to federal support mechanisms.
- Compass **voluntarily** filed Forms 499 for 2005 and 2006 despite the absence of any legal requirement to do so.
  - Moreover, as part of its voluntary submission, Compass filed within the timeframe established by Mr. Nand Gupta.
  - Compass has continued to timely file Forms 499A and 499Q.
  - Despite the absence of any legal requirement to do so, Compass has made **voluntary** and substantial payments to the USF, TRS, and LNP.
  - Under no circumstances should Compass be required to make contributions in excess of what would be required if such contribution requirements were applicable to Compass.
  - USAC's refusal to accept Compass' revised Forms 499 for 2005 and 2006 further increases Compass' overpayment of USF contributions.
  - Compass paid the NANP, LNP and SOW invoices in full.
  - Compass cannot be penalized for failing to satisfy its TRS contribution obligations when the amount of such obligations has yet to be determined by NECA.
  - With regard to the purported TRS contributions, Compass' NECA appeal remains pending, and there is no legally enforceable debt.

**C. Statute of Limitations**

- The Commission impermissibly attempts to impose liability for a period in excess of the applicable statute of limitations.
- The applicable statute of limitations is one year.
  - The NAL imposes liability for a period of 22 months.
  - The extension of the one year statute of limitations is yet another example of the Commission's impermissible "adjudi-making."
  - The Commission lacks the authority to waive the one year statute of limitations.
  - The Commission's reliance of *Globcom* is misplaced.
  - The Commission's unilateral expansion of the statute of limitation constitutes a violation of the APA.
  - The NAL fails to distinguish between determining liability and measuring culpability.
    - While the consideration of prior offenses may be appropriate in determining a proper forfeiture amount, the Commission is barred from imposing liability for actions occurring outside the applicable statute of limitations.
  - The imposition of liability for a 22-month period is contrary to Commission precedent.

**SUMMARY OF COMPASS GLOBAL'S POSITIONS – OVERVIEW OF COMPASS NAL RESPONSE**  
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- The use of the continuing liability theory eviscerates the statute of limitation and contravenes Congressional intent.
- The extension of the statute of limitations results in arbitrary and capricious discrimination against Compass.

